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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

——— Term, 1964

No. ~~235~~

NATIONAL LABOR RELATIONS BOARD,
Respondent

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1242,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Local 1242, International Longshoremen's Association, AFL-CIO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The Decision and Order of the National Labor Relations Board is reported at 138 NLRB 737 (1962). The Opinion of the Court of Appeals for the Third Circuit is reported at ——— F. 2d ——— (1964).

JURISDICTION

The Decree of the Court of Appeals for the Third Circuit was entered on April 6, 1964 (Appendix pp. 9-17). The jurisdiction of this Court is conferred by 28 USC 1254 (1).

QUESTIONS PRESENTED

Whether the Court of Appeals correctly upheld the National Labor Relations Board's determination that the loss of work opportunity by clerks and checkers, resulting from the discriminatory lockout of longshoremen members of a sister union, did not constitute a violation of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, 61 Stat. 136, et seq., 29 USC 151, et seq., Sections 8(a)(1) and 8(a)(3) and Section 502, 29 USC 143 (Appendix pp. 37-38).

STATEMENT OF THE CASE

The petitioner in this case is Local 1242, International Longshoremen's Association, AFL-CIO. (hereinafter referred to as Local 1242). This labor organization represents clerks and checkers who are engaged in the Port of Philadelphia in the counting and checking of cargo loaded onto and unloaded from vessels (Joint Appendix, 21a). Local 1291, International Longshoremen's Association, AFL-CIO (hereinafter referred to as Local 1291), is a sister labor organization representing the longshoremen who perform the actual loading and unloading of vessels in the Port of Philadelphia (J. A. 20a). Both of these organizations are parties to collective bargaining agreements with the Philadelphia Marine Trade Association (hereinafter referred to as PMTA), a group of employers combined for purposes of collective bargaining (J. A. 14a).

On June 30, 1959, several gangs of longshoremen (represented by Local 1291) were hired to unload a full cargo of bagged sugar from the S. S. CARIBE. Upon arriving

at the ship the men learned that they were to unload the bags with the use of wooden pallets rather than slings (J. A. 6a). The men refused to use the pallets as they considered such an operation unsafe, and when Union representatives were unable to get the Employer to agree to substitute slings, they left the ship (J. A. 6a, 17a). Negotiations between officials of the I.L.A. and PMTA over the next several days failed to break the impasse (J. A. 6a, 7a, 18a, 19a).

On July 6, 1959, PMTA members locked out all longshoremen of Local 1291 in the Port of Philadelphia (J. A. 7a, 20a). The lockout continued through July 21, at which time the PMTA agreed to submit the safety question in binding arbitration (J. A. 7a). The lockout ended on the following day, after the arbitrator decided that the use of pallets to unload the CARIBE was unsafe (J. A. 7a, 20a). During this period members of I.L.A. Locals 1242 (clerks and checkers), 1332 (coastwise longshoremen), and 1566 (maintenance, ship cleaners and carpenters) also were locked out, i. e., not hired, except for a few in the days immediately after the lockout began (J. A. 21a).

Unfair labor practice charges were filed against the PMTA and its members alleging a violation of Sections 8(a)(1) and 8(a)(3) of the Act because of the lockout of employees. After extensive hearings, the Trial Examiner found that the longshoremen's refusal to work with pallets was a quitting of labor by employees in good faith because of abnormally dangerous conditions for work, and hence, under Section 502 of the Act, was not a strike. He concluded that the PMTA's lockout of longshoremen was violative of Sections 8(a)(1) and 8(a)(3) of the Act (J. A. 23a, 24a). He also found that the lockout resulted in "equally unlawful discrimination against members of the sister locals", such as the clerks and checkers represented by Local 1242 (J. A. 23a).

The National Labor Relations Board affirmed the Trial Examiner's finding that the longshoremen's quitting of work

was protected by Section 502 of the Act, and that the employers' lockout of longshoremen discriminated against them in violation of the Act (J. A. 7a, 8a). The Board, however, disagreed with the Trial Examiner's finding that this lockout discriminated against members of sister locals, such as clerks and checkers who were members of Local 1242. The Board said that the complaint did not allege that they were discriminatorily locked out and the evidence did not establish it. Thus, the Board found no discrimination against them (J. A. 8a).

The Court of Appeals affirmed the Board's holding upon petitions filed with it pursuant to Sections 10(e) and 10(f) of the Act, 29 USC 160(e) and (f). It interpreted the Board holding as a finding of "no evidence of any discriminatory motivation toward employees other than longshoremen" (Appendix, page 16). It found that the loss of employment suffered by clerks and checkers and others was because of the nature of their work and not because of the employer's discriminatory intent. Thus, the court limited the effect of the employer's lockout only to those directly locked out and not to those who were necessarily deprived of work as a result of the lockout.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Third Circuit is contrary to this Court's pronouncements on the discriminatory effect of conduct violative of the National Labor Relations Act. The Court of Appeals affirmed the Board's finding that the PMTA, the employer here, had violated the Act, but it also affirmed the Board's limitation upon the effect of that discriminatory conduct. It is on this issue that it erred.

We view the decisions of this Court as holding that a party is responsible under the National Labor Relations Act for all of the foreseeable consequences of his acts. Thus,

In *Radio Officers Union vs. NLRB*, 347 U.S. 17 (1954), it was held that discriminatory intent is sufficiently established where the natural and foreseeable consequence of conduct is to encourage or discourage union membership. A specific purpose to affect particular individuals need not be shown if the consequence of an employer's action has a proscribed result. This point was elaborated more recently in *NLRB vs. Erie Resistor Corporation*, 373 U.S. 221 (1963), where it was noted that discriminatory intent extends to ". . . unavoidable consequences which the employer not only foresaw but which he must have intended", 373 U.S. at page 228.

Here, the Board and the Court of Appeals found that the employer illegally locked out longshoremen. This discriminatory lockout produced the same discriminatory effect upon the clerks and checkers of Local 1242 and upon other similarly allied workers. In his Intermediate Report, the Trial Examiner found:

> "(6) It is undisputed that the work of members of these various ILA locals is interrelated, and that when longshoremen are not employed in loading and unloading the workers in the other classifications are also generally without work." (J.A. 21a).

The discriminatory lockout by the PMTA members produced the same discriminatory effect upon the members of Locals 1242, 1332 and 1566 as upon the longshoremen members of Local 1291. These locals are sister locals in the same international union. It is undisputed that the work of their members is interrelated, and that when longshoremen are not employed in loading and unloading, the workers in the other classifications are also generally out of work (J.A. 21a). Furthermore, the various locals are treated as a unity in their dealings with the PMTA. Their contracts contain a large number of identical provisions, run together, and employ the same arbitrator (J.A. 309a).

Indeed, the record clearly demonstrates that the PMTA regarded the CARIBE matter as a dispute with the I.L.A. as a whole, not just with Local 1291. At the hearing it offered a considerable amount of testimony to show the similarity between the present dispute and former ones involving the other locals (J.A. 307a), and to note that the lockout was the policy it followed in all such disputes (J.A. 257a, 268a). Moreover, here, as in past disputes, it dealt primarily with officials of the International, not just with representatives of the locals (J.A. 149a, 150a, 275a).

It is totally unrealistic to hold, as did the Board and the Court of Appeals, that the lockout of longshoremen was discriminatory, but that the consequent and inevitable loss of work for other employees is merely incidental and not in violation of the Act. If the longshoremen are locked out, it is a natural, foreseeable consequence that the clerks and checkers cannot work.

The Trial Examiner found as a fact that the work of the two groups was "interrelated" and that when longshoremen did not work, other classifications did not work (J.A. 21a). The Court of Appeals treats the Board's reversal of the Trial Examiner on this question as "based on an issue of law" (Appendix, page 16). Yet the Court of Appeals, and also the Board, ignore the Trial Examiner's factual finding as to the interrelationship and interdependence of the work of longshoremen to that of other classifications.

It is the Trial Examiner's factual findings as to the relationship between classifications that the Board and the Court of Appeals disregard, and, in effect, reverse. The Court of Appeals does so by saying that the Board only reversed the Trial Examiner's finding of discrimination against classifications other than longshoremen. But the Trial Examiner only said that the discrimination against clerks and checkers was a "natural and foreseeable consequence(s)" of the discrimination against longshoremen. *Radio Officers Union vs. NLRB, supra.*

In reviewing the Board decision, the Court of Appeals did not follow this Court's direction in *Universal Camera Corporation vs. NLRB*, 340 U.S. 474 (1951). There this Court discussed the role of the examiner and held that his findings must be given weight even where the Board disagrees with his conclusion. Here neither the Board nor the Court of Appeals overruled the Trial Examiner's basic and crucial finding as to the relationship between the longshoremen and other employees yet gave such finding no weight.

There is simply no basis for attempting to distinguish between groups of employees who were all affected by the discriminatory lockout. Their status was intertwined and what prevented the longshoremen from working made it impossible for the clerks and checkers to perform their duties.

The failure of the Board and the Court of Appeals to consider the total effect of the discrimination is contrary to the holding of this Court in *Radio Officers*. This Court there held that specific proof of an intention to discriminate against a particular group is not necessary if such a result flows naturally from the proscribed conduct. Here there was discrimination against longshoremen. The employers well knew that if longshoremen were not permitted to work, clerks and checkers and others could not work even had they wanted to.

This case constitutes a step backward from the broad approach adopted by this Court in *Radio Officers* and *Erie Resistor*. The effect of an employer's discrimination cannot be limited as the Board and the Court of Appeals did. The discrimination against the longshoremen had the necessary, foreseeable and unavoidable consequence of discriminating against clerks, checkers and others. The decision of the Court of Appeals for the Third Circuit in this regard should be reversed.

CONCLUSION

For all the foregoing reasons this petition for certiorari should be granted.

WILDERMAN, MARKOWITZ & KIRSCHNER

By LOUIS H. WILDERMAN

By RICHARD H. MARKOWITZ

Attorneys for Petitioner

Appendix "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,225

PHILADELPHIA MARINE TRADE ASSOCIATION
AND ITS MEMBERS,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

LOCAL 1291, ILA,
Intervenor.

LOCAL 1332, ILA,
Intervenor.

No. 14,257

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION LOCALS 1291, 1332,
1566 and 1242,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

PHILADELPHIA MARINE TRADE ASSOCIATION
AND ITS MEMBERS,
Intervenors.

On Petitions for Review and Cross Petition for
Enforcement of an Order of the National
Labor Relations Board

Argued November 4, 1963

Before STALEY, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed April 6, 1964)

By STALEY, *Circuit Judge.*

The National Labor Relations Board has found that the employer-members of the Philadelphia Marine Trade Association ("PMTA") violated §8(a)(3) and (1) of the National Labor Relations Act.[1] More specifically, the Board determined that these employers wrongfully locked out all of the longshoremen employed by them in the Port of Philadelphia because certain of those longshoremen properly refused to work under conditions found to be unsafe. 138 N.L.R.B. 737 (1962). The case is here on petitions for review filed by the PMTA and by the International Longshoremen's Association, Locals 1291, 1332, 1566, and 1242. The Board has requested enforcement of its order in its answer to the petition of the PMTA. The PMTA asserts that the Board's determination is unwarranted, while the union contends that the Board should have found additional violations and that its back pay award is inadequate.

The dispute which gave rise to the instant proceeding was based upon the insistence by one of the employer-members of the PMTA, Atlantic and Gulf Stevedores, Inc., that the longshoremen employed by it use wooden pallets

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[1] §158. Unfair labor practices

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C.A. §158(a)(1) and (3).

instead of slings to unload a cargo of sugar on the S. S. Caribe. Perhaps the most concise statement of the factual circumstances attending this controversy is contained in the following excerpt from the decision of the Board:

> "As the Trial Examiner found, on June 30, 1959, some 90 A & G employees, longshoremen members of Local 1291, reported to the S. S. Caribe to unload a full cargo of bagged sugar. Upon arrival, they learned that they were to unload the bags with the use of pallets rather than slings. They notified their union representatives that they would not unload with pallets as they considered such an operation unsafe. The representatives communicated the longshoremen's decision to Emery, the pier supervisor of A & G, and a compromise proposal was offered by Emery whereby the longshoremen would unload the ship with slings and then use pallets for rehandling the bags on the dock. By the time Local 1291 accepted, however, the proposal was abruptly withdrawn by William Toner, District Manager of A & G, who made his appearance while the Union representatives were conferring among themselves. The longshoremen then left the ship, and worked neither that day nor the following day, July 1. After several conferences between officials of ILA, A & G, and PMTA, an employers' association of which A & G was a member, an agreement was reached between Toner and J. T. Moock, a vice-president of ILA, whereby the men would start unloading with pallets and a changeover to slings would be made shortly thereafter.
>
> "At 8 a.m. on July 2, the A & G longshoremen began unloading with the use of pallets. It is clear, as the Trial Examiner found, that bags of sugar fell from the pallets during the unloading operation. And Toner admitted that even one falling bag was dangerous. When a shift to slings was not made by A & G

during the morning despite the complaints of the longshoremen, they refused to return to work after lunch. The Respondents thereupon advised ILA by telegram that unless the A & G longshoremen resumed work on the Caribe at 8 a.m. on July 3, all longshoremen represented by Local 1291 would be locked out throughout the entire Port of Philadelphia commencing July 6. At 8 a.m. on July 3, however, A & G still had not shifted to slings, and the Caribe longshoremen accordingly continued to refuse to work. At noon all the other longshoremen members of Local 1291 in the Port of Philadelphia area stopped work to meet at the union hall for a discussion of the lockout threatened by the Respondents. They were directed by ILA officials to report for work as usual on July 6. When they did, however, the Respondents carried out their threat and locked them out. Moreover, the Respondents insisted that the lockout would not be lifted until the A & G longshoremen resumed work under the unsafe conditions which had caused them to cease work in the first place. The Respondent further refused to consider the safety question under the grievance and arbitration provisions of the contract until the longshoremen resumed work on the Caribe. On July 21, however, the Respondents finally receded from their position, agreed to end the lockout, and likewise agreed to arbitrate the safety question. On the following day, the arbitrator observed the operation of unloading the bagged sugar from the Caribe with the use of pallets, and found it to be an unsafe operation. Thereupon, A & G substituted slings, and the A & G longshoremen completed their work of unloading the Caribe, without further incident."

The Board held that, as the longshoremen's refusal to work resulted from an abnormally dangerous condition of work, this refusal did not constitute a strike under §502 of

the Act,[2] even assuming the existence of a no-strike contract. Accordingly, this quitting of labor was held to be protected by the Act, and the lockout was found to be in violation of §8(a)(3) and (1). Back pay was awarded to all longshoremen, including those who had refused to work on the S. S. Caribe, from the date of the lockout on July 6, 1959, until July 22, 1959. However, the Board, reversing the trial examiner, concluded that, in the circumstances of this case, the employers did not discriminate against the members of sister unions who did not work during the period of the lockout and who were normally employed as maintenance men, timekeepers, checkers, or carloaders in the Port of Philadelphia.

The PMTA does not seriously challenge the Board's finding that the work stoppage was caused by an abnormally dangerous condition of work. See National Labor Relations Board v. Knight Morley Corp., 251 F. 2d 753 (C.A. 6, 1957), cert. denied, 357 U. S. 927 (1958). The Association argues, however, that the lockout was justified because its purpose was to compel the union to abandon a "quickie strike," and to compel the submission of the dispute to arbitration. The short answer to this is that because the union's activity was found to come within the ambit of §502, it was not a strike in violation of the contract but, on the contrary, was protected activity. In these circumstances, the Board properly concluded that the lockout by the PMTA in an attempt to compel the longshoremen to abandon this protected activity gave rise to a violation of §8(a)(3) and (1). See, Utah Plumbing and Heating Contractors Assn. v. National Labor Relations Board, 294 F. 2d 165 (C.A. 10, 1961); Quaker

[2] §143. Saving provisions

"Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, . . .; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." 29 U.S.C.A. §143.

State Oil Refining Corp. v. National Labor Relations Board, 270 F. 2d 40 (C.A. 3), cert. denied, 361 U. S. 917 (1959); National Labor Relations Board v. Knight Morley Corp., supra (discharge for refusal to work under abnormally dangerous conditions). Moreover, the Board, based upon substantial evidence, found that it was the PMTA and not the union which delayed arbitration by its insistence that the employees continue to work pending a resolution of the issue. Thus, to the extent that the challenge of the PMTA to the finding of an unfair labor practice constitutes an attack upon the Board's findings of fact, including both the inferences it drew from the evidence presented as well as its resolution of issues of credibility, we have repeatedly stated that such factual determinations will not be disturbed by this court unless not supported by substantial evidence in the record as a whole. National Labor Relations Board v. Chas. S. Wood & Co., 309 F. 2d 140 (C.A. 3, 1962); National Labor Relations Board v. Buitoni Foods Co., 298 F. 2d 169 (C.A. 3, 1962); Quaker State Oil Refining Corp. v. National Labor Relations Board, supra. Here the findings of the Board are amply supported by the evidence.[3]

The reliance by the PMTA upon the decision in National Labor Relations Board v. Truck Drivers' Local Union No. 449, 353 U. S. 87 (1957), as justification for the lockout is misplaced. The Supreme Court there held that a lockout by an association of employers is not unlawful when used as a defense to a union's "whipsawing" strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis. See also New York Mailers' Union Number Six v. National Labor Relations Board, 327 F. 2d 292 (C.A. 2, 1964). Here the lockout was a countermeasure not to a strike, but to a refusal to work under abnormally dangerous conditions. Nor was this conduct of the longshoremen a threat to bargaining on a group basis.

[3] The same observations apply to the contention that the employers were not informed that the quitting of labor resulted from abnormally dangerous conditions of work, and that they were not given a reasonable opportunity to correct these conditions.

Local 1332 of the International Longshoremen's Association has been granted leave to intervene in each of these petitions for review. Both it and the other union parties to this proceeding vigorously attack the failure of the Board to find a violation with respect to employees other than longshoremen who were affected by the lockout. Because of its significance, we quote the holding of the Board on this score:

> "We do not agree, however, with the Trial Examiner's further conclusion that the lockout of the longshoremen also constituted unlawful discrimination against members of sister locals normally employed by Respondents as maintenance men or timekeepers or checkers of carloaders. The complaint does not allege that members of these sister locals (specifically, Locals 1332, 1566 and 1242) were also locked out by Respondents, nor does the evidence adduced at the hearing lead us to this conclusion. Accordingly, we find, in the circumstances of this case, that the Respondents did not discriminate against the other categories of employees represented by Locals 1332, 1566, and 1242."

The unions argue that this holding constitutes an unwarranted reversal by the Board of the factual finding of the trial examiner that these employees were deprived of an opportunity to work by the lockout. Further, the unions contend that the Board was compelled to find a violation as to these employees because their work "was interrelated with and wholly dependent upon the work performed by [the longshoremen]."

The Board concedes that these employees lost work as a consequence of the lockout. It urges that its reversal of the trial examiner on this point was not based on a contrary view of the facts, but upon its view of the legal effect of the facts he found. More particularly, the Board contends that the loss of work by employees other than longshoremen did

not result from any discriminatory action by the PMTA against them, but was simply an incidental consequence of the discriminatory action takes against the longshoremen.

We think that the Board's reversal of the trial examiner was based on an issue of law rather than a question of fact. Though at first glance the language in its decision appears to indicate a different view of the evidence, actually the Board was reversing the trial examiner's legal conclusion that "the lockout of Local 1291 members resulted in equally unlawful discrimination against members of sister locals, since much of their employment depended upon longshoremen being employed."

It is not controverted that the PMTA had no dispute with the members of the sister locals; its dispute was with the longshoremen because of their refusal to work under the conditions found to be dangerous. To put the matter another way, there is no evidence of any discriminatory motivation toward employees other than longshoremen. As the Board aptly observes in its brief, the consequential injury to the other workers "occurred because of the nature of their work, not by virtue of their membership in any union." In the absence of any evidence of discriminatory intent, the employers' action was not unlawful as to these employees, unless it was "inherently discriminatory." National Labor Relations Board v. Erie Resistor Corp., 373 U.S. 221 (1963). We have already stated that the record does not reveal an intent to discriminate against the members of the sister locals, and we cannot say that the lockout was inherently discriminatory as to them in the circumstances of this case. In sum, the conduct of the employers was directed against the longshoremen, and only incidentally did it affect the other workers in the Port of Philadelphia.

Our recent decision in National Labor Relations Board v. Local 825, International Union of Operating Engineers, 326 F. 2d 218 (C.A.3, 1964), supports our conclusion on

this point. We there ruled that union conduct which only incidentally affects a neutral employer cannot be held to violate the secondary boycott provisions of the Act.

Local 1291 asserts that the back pay award to the longshoremen who refused to work on the S.S. Caribe should run from the date of their refusal to work rather than from the date of the lockout. The Board contends that the award is proper since the unfair labor practice did not occur until the PMTA instituted the lockout. We think that the rationale of the Board is sound, for though the longshoremen were protected by the statute in refusing to work under abnormally dangerous conditions, no unfair labor practice arose until they were locked out by their employer. In any event, we cannot say that the Board abused the broad discretion vested in it to fashion remedial back pay orders to effectuate the policies of the Act.

The order of the Board will be enforced. A form of decree may be submitted.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

On December 14, 1960, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents other than Northern Metal Co. had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents and the General Counsel filed exceptions to the Intermediate Report and the Respondents filed a supporting brief. Subsequently, by order dated August 2, 1961, the Board remanded this matter for the purpose of adducing additional evidence. After further hearing, the Trial Examiner, on February 8, 1962, issued his Supplemental Intermediate Report, a copy of which is

attached hereto, containing further findings of fact, conclusions of law, and recommendations with respect to the evidence adduced at such reopened hearing. Thereafter, the Respondents filed exceptions to the Supplemental Intermediate Report with a supporting brief. The Charging Party (ILA) and the General Counsel filed briefs in support of the Supplemental Intermediate Report.

The Board has reviewed the rulings of the Trial Examiner made at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Supplemental Intermediate Report, the exceptions and briefs, and the entire record in this case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with certain modifications indicated below.

As the Trial Examiner found, on June 30, 1959, some 90 A & G employees, longshoremen members of Local 1291, reported to the S. S. Caribe to unload a full cargo of bagged sugar. Upon arrival, they learned that they were to unload the bags with the use of pallets rather than slings. They notified their union representatives that they would not unload with pallets as they considered such an operation unsafe. The representatives communicated the longshoremen's decision to Emery, the pier supervisor of A & G, and a compromise proposal was offered by Emery whereby the longshoremen would unload the ship with slings and then use pallets for rehandling the bags on the dock. By the time Local 1291 accepted, however, the proposal was abruptly withdrawn by William Toner, District Manager of A & G, who made his appearance while the Union representatives were conferring among themselves. The longshoremen then left the ship, and worked neither that day nor the following day, July 1. After several conferences between officials of ILA, A & G, and PMTA, an employers' association of which

[1] The Respondent's request for oral argument is denied as the record, including the briefs, adequately sets forth the issues and the positions of the parties.

A & G was a member, an agreement was reached between Toner and J. T. Moock, a vice-president of ILA, whereby the men would start unloading with pallets and a change-over to slings would be made shortly thereafter.

At 8 a.m. on July 2, the A & G longshoremen began unloading with the use of pallets. It is clear, as the Trial Examiner found, that bags of sugar fell from the pallets during the unloading operation. And Toner admitted that even one falling bag was dangerous. When a shift to slings was not made by A & G during the morning despite the complaints of the longshoremen, they refused to return to work after lunch. The Respondents thereupon advised ILA by telegram that unless the A & G longshoremen resumed work on the Caribe at 8 a.m. on July 3, all longshoremen represented by Local 1291 would be locked out throughout the entire Port of Philadelphia commencing July 6. At 8 a.m. on July 3, however, A & G still had not shifted to slings and the Caribe longshoremen accordingly continued to refuse to work. At noon all the other longshoremen members of Local 1291 in the Port of Philadelphia area stopped work to meet at the union hall for a discussion of the lockout threatened by the Respondents. They were directed by ILA officials to report for work as usual on July 6. When they did, however, the Respondents carried out their threat and locked them out. Moreover, the Respondents insisted that the lockout would not be lifted until the A & G longshoremen resumed work under the unsafe conditions which had caused them to cease work in the first place. The Respondent further refused to consider the safety question under the grievance and arbitration provisions of the contract until the longshoremen resumed work on the Caribe. On July 21, however, the Respondents finally receded from their position, agreed to end the lockout, and likewise agreed to arbitrate the safety question. On the following day, the arbitrator observed the operation of unloading the bagged sugar from the Caribe with the use of pallets, and found it to be an unsafe operation. Thereupon, A & G substituted slings, and

the A & G longshoremen completed their work of unloading the Caribe, without further incident.

The Trial Examiner found that in the circumstances here present the quitting of labor by the Caribe longshoremen was because of abnormally dangerous conditions for work, and under Section 502 of the Act was not a strike, even assuming the existence of a no-strike contract. He further found that the Respondents' lockout of all the longshoremen in the Port because of this protected quitting of labor was discriminatory and a violation of Section 8(a)(3) and (1) of the Act. We agree.

We do not agree, however, with the Trial Examiner's further conclusion that the lockout of the longshoremen also constituted unlawful discrimination against members of sister locals normally employed by Respondents as maintenance men or timekeepers or checkers or carloaders. The complaint does not allege that members of these sister locals (specifically, Locals 1332, 1566 and 1242) were also locked out by Respondents, nor does the evidence adduced at the hearings lead us to this conclusion. Accordingly, we find, in the circumstances of this case, that the Respondents did not discriminate against the other categories of employees represented by Locals 1332, 1566, and 1242.

The remedy recommended by the Trial Examiner requires some clarification in another respect also.[2] Although the longshoremen who lawfully refused to work the Caribe between July 6 and July 22 are not, by the terms of Section 502, classified as strikers, the Board must nevertheless analogize them to strikers in reaching a backpay determination. Just as economic strikers are not reimbursed for the time they were on strike and did not work, the Respondents herein need not reimburse the Caribe longshoremen for refusing to work the Caribe. On the other hand, such long-

[2] We agree with the Trial Examiner that other members of Local 1291, who were not engaged in a work stoppage against the Caribe, shall be reimbursed for all monies they lost as a result of Respondent's lockout.

shoremen, when not actually employed, would normally shape up for other longshore work, and might have worked other ships coming into the Port of Philadelphia, absent the Respondents' lockout. They shall be reimbursed for such lost earnings.

The precise purport of the Trial Examiner's suggestion for modifying our backpay procedures, by leaving to the parties' arbitration procedure the determination of a backpay amount and its distribution, is not entirely clear. In any event, the parties are normally free to arrive at a backpay settlement among themselves, either by negotiation or through the arbitration procedure under their contract. Accordingly, we see no reason to deviate from our standard practice in backpay determinations.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Philadelphia Marine Trade Association and its members, listed in the caption of this case, with the exception of Northern Metal Co., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 1291, International Longshoremen's Association, AFL-CIO, or in any other labor organization, by locking out or in any other manner discriminating against their employees in regard to their hire or tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for

the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole all employees unlawfully locked out between the dates of July 6 and July 22, 1959, in the manner set forth in "The Remedy" section of the Intermediate Report as modified herein.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records necessary for the determination of the amount of backpay due.

(c) Post at their respective offices, copies of the notice attached hereto as "Appendix A."[3] Copies of said notice, to be furnished by the Regional Director for the Fourth Region shall, after being duly signed by the Respondents, be posted immediately upon receipt thereof in conspicuous places, including all places where notices to employees are customarily posted, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for the Fourth Region signed copies of said notice for posting at each of the shapeup places customarily used by the above-named ILA Local.

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[3] In the event that this Order is enforced by a decree of the United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

(e) Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondents, and each of them, have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleged violations of the Act by Northern Metal Co.

Dated, Washington, D. C. Sep. 21, 1962.

FRANK W. McCULLOCH,
Chairman,
PHILIP RAY RODGERS,
Member,
BOYD LEEDOM,
Member,
JOHN H. FANNING,
Member,
GERALD A. BROWN,
Member,

(SEAL) NATIONAL LABOR RELATIONS BOARD.

INTERMEDIATE REPORT OF TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE CASE

Charges having been filed and duly served; a complaint, amended complaint and notice of hearing thereon having been duly issued and served by the General Counsel of the National Labor Relations Board; and answers having been filed on behalf of all the Respondents named above, a hearing involving allegations of unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, was held in Philadelphia, Pennsylvania, on October 10, 11 and 12, 1960, before the undersigned Trial Examiner.

At the hearing all parties were represented by counsel and were afforded full opportunity to present evidence pertinent to the issues, to argue orally, and to file briefs. Oral argument was waived. Briefs have been received from all parties.

Disposition of the Respondents' motions to dismiss the complaint, upon which ruling was reserved at the conclusion of the hearing, is made by the following findings, conclusions and recommendations.

Upon the record thus made, and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

Philadelphia Marine Trade Association, herein called PMTA, is a nonprofit Delaware corporation and maintains its principal place of business in Philadelphia, Pennsylvania. It is authorized to and conducts collective bargaining activities with the International Longshoremen's Association on behalf of its members named herein who employ labor represented by ILA.

Various members of PMTA are engaged within the Port of Philadelphia [1] and its vicinity in such business enterprises as the operation of foreign and coastal shipping lines, shipping agents for foreign and domestic waterborne freight traffic, the operation of marine terminals, and the operation of enterprises providing various services to the maritime industry in and about the Port of Philadelphia.

The Respondent members of PMTA collectively have annual receipts of more than $10,000,000 derived from

[1] The complaint alleges and the answer admits that the Port of Philadelphia is a term employed by maritime, governmental and economic circles to describe the tidal estuary of the Delaware River and the various sea and water ports and terminals found thereon, including but not limited to the Ports of Wilmington, Delaware; Chester and Philadelphia, Pennsylvania; and Camden and Trenton, New Jersey.

services supplied by them in connection with the movement of goods in foreign commerce and domestic interstate commerce and or from services supplied by them to firms that are themselves directly engaged in foreign or interstate commerce.

The complaint alleges, the answer admits and the Trial Examiner finds that PMTA and each of its members named as Respondents are engaged in commerce and are employers within the meaning of the Act.

II. The Labor Organizations Involved

International Longshoremen's Association, AFL-CIO, and its Locals 1291, 1332, 1566, and 1242 are labor organizations within the meaning of the Act.

III. The Unfair Labor Practices

A. *Setting and Major Issues*

The chief issue raised by the complaint is General Counsel's contention that between July 6 and July 22, 1959, the Respondents unlawfully locked out and refused to employ members of Local 1291, ILA, in the Port of Philadelphia. The lockout was unlawful, he claims in effect, because on June 30, 1959, and thereafter members of that Local who had been employed by one PMTA member to unload sugar cargo declined to work the ship with the equipment provided, believing in good faith that use of such equipment "would create abnormally dangerous" work conditions.[2]

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[2] Section 502 of the Act provides; nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; *nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act* (Italics supplied).

The record reveals small dispute as to the facts that: (1) Local 1291 members declined to work the ship in question; and (2) PMTA for this reason ordered the lockout of all 1291 members in the Port. Opposing counsel urge varying interpretations of these and other relevant facts which will be set out and discussed below.

As a subsidiary issue it is General Counsel's position, denied by the Respondents, that as an inescapable result of the unlawful discrimination against Local 1291 members an undetermined number of members of associated ILA Locals—covering such classifications as checkers and carloaders — were also unlawfully deprived of employment during the lockout period.

B. *The Relevant Facts*

A summary of the main material and chronological facts, based upon documents and credible testimony,[3] follows:

(1) On June 30 the S. S. CARIBE docked at a Philadelphia pier with full cargo of refined sugar in 100-pound bags.

(2) Throught the prevailing hiring method of shape-up, about 90 members of Local 1291 were employed that morning to unload the sugar by Atlantic and Gulf Stevedores, Inc., hereinafter called A & G, one of the Respondent members of PMTA.

(3) Upon reporting at the pier, employees learned that they would be required to use wooden pallets, instead of customary slings, to unload the sugar. Some of these employees promptly sought out and reported to official representatives of their Local these requirements and stated that they would not unload under such unsafe conditions.

(4) ILA representatives came to the pier. They first discussed the problem with one of A & G's supervisors,

[3] Major contradictions will be resolved in appropriate footnotes.

Emery, who proposed as a compromise that the men unload by slings from the ship and use pallets for rehandling on the dock. ILA agents conferred with themselves and members and agreed that this proposal would be acceptable. By the time they reported acceptance to Emery, however, that latter's superior, Manager Toner, arrived and the proposal was withdrawn.

(5) There followed a telephonic conference between Toner, ILA agents and Alfred Corry, Executive Secretary of PMTA. An impasse was reached when the employer took the position that the men must use the pallets or leave the pier. The men left, refusing to use pallets to unload.

(6) Later that day Corry sent the following telegram to Richard Askew, President of Local 1291:

> A DISPUTE AROSE AT PIER 38-40 SOUTH TODAY REGARDING LONGSHOREMEN REPRESENTED BY LOCAL 1291 ILA INDEPENDENT REFUSAL TO DISCHARGE BAGS OF SUGAR ON PALLETS WHICH IS THE EMPLOYER'S PREROGATIVE FROM THE SS CARIBE YOU ARE HEREBY NOTIFIED THAT UNLESS THE MEN RETURN TO WORK FOR ATLANTIC & GULF STEVEDORES, INC. TOMORROW MORNING JULY 1ST 1959 AT 8 AM ON THE SS CARIBE AND SUBMIT WHATEVER GRIEVANCE THEY MIGHT HAVE TO THE GRIEVANCE PROCEDURE ESTABLISHED UNDER THE LABOR AGREEMENT NO EMPLOYERS IN THE PORT OF PHILADELPHIA WILL EMPLOY LONGSHOREMEN REPRESENTED BY ILA LOCAL 1291 STARTING 8 AM THURSDAY JULY 2ND AND THEREAFTER UNTIL YOU COMPLY WITH YOUR CONTRACTURAL OBLIGATIONS

(7) Members of 1291 reported for shape-up as usual the morning of July 1, but upon being informed that A & G

insisted that pallets and not slings be used they voted not to work, and did not.

(8) During the day of July 1 various conferences and telephone communications occurred between ILA officials and agents, officials of A & G and Corry. Finally a tacit agreement was reached between Toner, of A & G and J. T. Moock, a vice-president of ILA, that if the men would start unloading with pallets, a changeover to slings would shortly be made.[4]

(9) Later during the day Moock advised Corry by wire that men were being instructed to report for work the next morning, whereupon Corry advised PMTA members to hire.

(10) Men were hired the morning of July 2 and began unloading with pallets. ILA officials and agents were present and observing, one at each of the four hatches. There is no dispute as to the fact that bags of sugar fell from the pallets in unloading that morning. While the estimates given by ILA agents considerably exceeded that offered by Toner, who was also present, the latter admitted that he saw "five bags an hour" fall off, and that "even one bag is dangerous."

(11) During the morning employees complained to ILA agents and demanded to know when the shift would be made, as promised, to slings. It is undisputed that shortly after 10 o'clock Moock asked Toner when he was "going to make the change," and that Toner replied that if he "and the delegates would get out of here the change would be made."

[4] Toner denied emphatically that even "one mention was made" about such an arrangement. Not only because of his observation of Toner as a witness, but because of the inherent probabilities in the situation, as revealed by events the next morning as to which there is no dispute, described above, the Trial Examiner cannot accept Toner's denial.

(12). A & G refused to shift to use of slings, however, and at noon the men knocked off and declined to return under these conditions. That afternoon Corry sent Moock and other ILA officials telegraphic notification that "unless longshoremen resume work on the SS CARIBE at 8 AM Friday, July 3rd, no longshoremen represented by Local 1291 will be hired in the Port commencing Monday, July 6th."

(13) A meeting of longshoremen was held during the afternoon of July 3, at which time Corry's above-described wire was read to them and they received instructions from the head of Local 1291 to report to regular shape-up points the morning of July 6.

(14) Counsel for the Respondents conceded at the hearing that there was no hiring of longshoremen by PMTA members from July 6 to July 22, pursuant to Corry's wire.

(15) Between July 6 and July 21 many meetings were held with ILA and PMTA officials present, as well as a Federal Mediator. On the last mentioned date the ILA filed a Complaint in Equity in the U. S. District Court seeking a court order requiring, among other things, cessation of the lockout. Later the same day the Respondents agreed to submit the safety question to an impartial arbitrator, his decision to be binding upon both parties.

(16) On the morning of July 22 the arbitrator, Nochem S. Winnet, in the presence of the parties, observed the operation of unloading with the pallet equipment. The same day he issued his report which, contained, following his findings, the:

AWARD

> The use of pallets to unload bagged sugar from the SS CARIBE is not a safe operation.

(17) With this decision the dispute between the Respondents and Local 1291 ended and the lockout ceased.

As to the question of affected sister locals, a summary of pertinent facts follows:

(1) Local 1291 is the longshoremen and deep sea local. Its members load and unload deep-sea ships.

(2) Local 1332 is the coastwise and carloaders local. Members load and unload coastwise ships, trucks and railroad cars.

(3) Local 1566 covers maintenance men, ship cleaners and carpenters.

(4) Local 1242 has jurisdiction over clerks and checkers, and Local 1242-1 covers the timekeepers.

(5) Each of these ILA locals is covered by contract with PMTA.

(6) It is undisputed that the work of members of these various ILA locals is interrelated, and that when longshoremen are not employed in loading and unloading the workers in the other classifications are also generally without work.

(7) Agents of Locals 1242, 1566, and 1332 each testified that although their members shaped up during the period from July 6 to July 22, and except for some few shortly after July 6, none of such members were hired.[5]

As to Northern Metal Co. As to this employer member of PMTA, the record contains credible and undisputed evidence to the effect that: (1) the PMTA specifically excluded

[5] The record contains some tenuous testimony by officials of a few employer members of PMTA to the effect that some attempt to hire members of these locals was made on and after July 6. Its nature is such—in general being to the effect that instructions to hire were given to someone else, that the Trial Examiner considers it insufficient to dismiss the allegations of the complaint as they may affect such employers. As will be noted in the section entitled "The Remedy," such matters may more appropriately be explored at a subsequent compliance hearing, if required.

it from the Port lockout of 1291 longshoremen;[6] (2) at a meeting with counsel for ILA on July 6 agreement was made that ILA would supply longshoremen but that (3) on the morning of July 7 the men, including checkers and clerks, refused to accept the work tickets proferred them. Under these circumstances the Trial Examiner will recommend that the complaint be dismissed as to this Respondent.

C. *Conclusions*

In the opinion of the Trial Examiner, the preponderance of credible evidence fully sustains General Counsel's allegations of unfair labor practices as to all Respondents except Northern Metal.

The fact of unsafe conditions in unloading by use of pallets on this ship was not only established by the arbitrator's report but was tacitly admitted by A & G's Manager Toner, as noted above.

That longshoremen declined to work because in good faith they believed use of the pallets was unsafe is not only made plain by testimony of such employees and their agents, but in effect was conceded during the hearing by counsel for the Respondents when he stated:

> Now I certainly would be idiotic were I to suggest that there is no question of safety involved in the SS CARIBE, and I would agree that the men on the SS CARIBE, the longshoremen, had a *bona fide* belief of an unsafe condition.

The Respondents' lockout of Local 1291 members, the Trial Examiner believes, was unlawful and discriminatory within the meaning of Section 8(a)(3) and (1) of the Act. Section 502 of the Act clearly deprives of merit any contention by the Respondents that the quitting of work on the SS CARIBE was a "strike" and that therefore provi-

[6] This company handled military cargo, apparently the reason for the exception.

sions of the existing contract were applicable.[7] The PMTA insistence that the longshoremen endanger their lives by working under unsafe conditions while the question went through grievance and arbitration proceedings was contrary to both law and reason.[8]

Furthermore, the Trial Examiner finds merit in General Counsel's contention that ample evidence warrants the conclusion, here made, that the lockout of Local 1291 members resulted in equally unlawful discrimination against members of sister locals, since much of their employment depended upon longshoremen being employed. Such conduct affecting members of Locals 1332, 1566, and 1242 was likewise in violation of Section 8(a)(3) and (1) of the Act, and in support of this conclusion General Counsel properly cites *Radio Officers Union v. N. L. R. B.*, 347 U. S. 17, for the proposition that "a person is held to intend the natural and foreseeable consequences of his conduct."

Finally, since credible evidence shows that PMTA made an exception in the case of its member Northern Metal Co., and that members of Local 1291 declined to accept work tickets during the material period, the Trial Examiner concludes and finds that this Respondent did not engage in any unfair labor practices.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents, set forth in Section III, above, occurring in connection with their operations as described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among

[7] In his brief counsel for the Respondent urges: "There being an implicit no-strike clause in the collective bargaining agreement by virtue of the all-encompassing grievance and arbitration provision of Section 31, the walkout was both unlawful as a breach of contract and unprotected as not within Section 502 of the Act."

[8] See *Knight Morley Corporation*, 116 NLRB 140; enfd. 251 F. 2d 753 (C. A. 6).

the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. International Longshoremen's Association, AFL-CIO, and its Locals 1291, 1332, 1566 and 1242 are labor organizations within the meaning of Section 2(5) of the Act.

2. By discriminating in regard to the hire and tenure of employees, thereby discouraging membership in the above-named labor organizations, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed by the Act, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Northern Metal Co. has not engaged in the alleged unfair labor practices.

THE REMEDY

Having found that the Respondents have engaged in unfair labor practices, the Trial Examiner will recommend that they cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It will be recommended that the Respondent members of PMTA named in the caption herein, with the exception

of Northern Metal Co., make whole all employees who, by reason of the Respondents' discrimination against members of the four ILA Locals named herein, suffered loss of employment and pay during the period from July 6 to July 22, 1959, in accordance with Board policy set out in *F. W. Woolworth Company*, 90 NLRB 289. Each employer-member's liability, however, shall be limited only to monies which it normally would have paid to employees absent the unlawful lockout during that period, so that one employer-member shall not be liable for other than its own normal payroll during that period. (*See Galveston Maritime Association, Inc.*, 122 NLRB 699). It is recognized that unless in the interim the parties reach an equitable settlement as to the amounts due specific individuals a subsequent hearing may be required for such determination.

Since the violations of the Act which the Respondents committed are related to other unfair labor practices proscribed by the Act, and the danger of their commission in the future is reasonably to be anticipated from their past conduct, the preventive purposes of the Act may be thwarted unless the recommendations are coextensive with the threat. To effectuate the policies of the Act, therefore, it will be recommended that the Respondent cease and desist from infringing in any manner upon the rights guaranteed employees by the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law and upon the entire record, the Trial Examiner recommends that Philadelphia Marine Trade Association and its members listed in the caption of this case, with the exception of Northern Metal Co., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Longshoremen's Association, AFL-CIO, and its Locals 1291,

1332, 1566 and 1242, or in any other labor organization, by discharging, laying off, locking out, or in any other manner discriminating in regard to their hire or tenure of employment;

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Trial Examiner finds will effectuate the policies of the Act:

(a) Make whole all employees unlawfully discriminated against between the dates of July 6 and July 22, 1959, in the manner and to the extent set forth in the section above entitled "The Remedy";

(b) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all records necessary for the determination of the amounts of backpay due;

(c) Post at their respective offices, copies of the notice attached hereto as "Appendix." Copies of said notice, to be furnished by the Regional Director for the Fourth Region shall, after being duly signed by the Respondents, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of sixty (60) consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(d) Mail to the Regional Director for the Fourth Region signed copies of said notice for posting, the labor organizations willing, at each of the shapeup places customarily used by each of the above-named ILA Locals;

(e) Notify the said Regional Director, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report, as to what steps the Respondents, and each of them, have taken to comply with the Recommendations contained herein.

It is also recommended that, unless within the prescribed period the Respondents notify the said Regional Director that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring compliance.

Finally, it is recommended that the allegations of the complaint as to Northern Metal Co. be dismissed.

Dated at Washington, D. C., Dec. 14, 1960.

C. W. WHITTEMORE,
Trial Examiner.

Appendix "B"

STATUTORY PROVISIONS INVOLVED

The following are sections of the National Labor Relations Act, as amended:

UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor

organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ."

"Sec. 502.

Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

BRIEF FOR THE RESPONDENT IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 235

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1242, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 10-17) is reported at 330 F. 2d 492. The Board's decision and order (Pet. 17-36, J.A. 5a-51a)[1] are reported at 138 NLRB 737.

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[1] "J.A." refers to the joint appendix in the court of appeals which was filed with the petition. A supplemental intermediate report (J.A. 29a-51a), on which the Board's order was based in part, is omitted from the appendix to the petition.

JURISDICTION

The decree of the court of appeals was entered on April 30, 1964 (Pet. 39-40). The petition for certiorari was filed on July 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that, in the circumstances of this case, the loss of work opportunity by clerks and checkers, resulting from an unlawful lockout of longshoremen, did not constitute discrimination barred by the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in Appendix B to the petition.

STATEMENT

The Board's Findings of Fact.—On June 30, 1959, Atlantic & Gulf Stevedores, Inc. [hereinafter "A & G"] hired about 90 longshoremen who were members of Local 1291, International Longshoremen's Association, to unload a full cargo of bagged refined sugar from the *S.S. Caribe* (J.A. 6a; 54a, 99a, 133a, 137a, 358a, 363a). When the longshoremen learned that A & G planned to unload the ship by means of wooden pallets rather than canvas slings, they notified their union representatives that they would not unload with pallets because they regarded the operation as unsafe (J.A. 6a; 54a, 58a, 99a-100a, 133a-134a, 358a, 363a).

The representatives told A & G of the men's decision, but A & G announced that the ship would be unloaded with pallets or not at all (J.A. 6a; 56a-57a, 60a-61a, 100a, 168a-169a, 177a-178a). The longshoremen then recovered the hatches and left (J.A. 6a; 55a-58a, 61a-62a, 99a-100a).

Later that day, the executive secretary of the Philadelphia Marine Trade Association, which represented A & G in collective bargaining, sent a telegram to Local 1291 stating that, unless the longshoremen returned to work on the *Caribe* the following morning, the association would lock out all members of Local 1291 (J.A. 367a-368a). After several conferences between management and Union officials on June 30 and July 1, the Union and A & G reached agreement that the men would begin work on July 2 with pallets and would then shift to slings (J.A. 6a; 66a-91a, 135a). At 8 o'clock that morning, longshoremen began unloading the ship with pallets, but no change to slings was made. After lunch the men refused to work (J.A. 6a-7a; 65a-66a, 93a, 103a-105a, 112a-114a, 117a-118a, 123a-124a, 136a).

That afternoon the association telegraphed the Union that, unless longshoremen resumed work on the *Caribe* on July 3, all longshoremen represented by Local 1291 would be locked out by association members throughout the Port of Philadelphia beginning July 6 (J.A. 7a; 369a-370a). On July 3, longshoremen reported for work on the *Caribe*, but when A & G refused to shift to slings, they refused to work (J.A. 7a; 67a). On July 6, the longshoremen reported for

work as usual, but the members of the association refused to hire them (J.A. 7a; 68a-72a, 253a).

The current collective bargaining contract between the association and Local 1291 provided for arbitration of all disputes not otherwise resolved. During the lockout the association and the Union met in an effort to resolve the dispute. Throughout these discussions, the association refused to proceed with the grievance and arbitration provisions of the contract unless the longshoremen agreed to work with pallets (J.A. 7a; 72a-74a, 158a, 263a).

On July 21, the parties agreed to arbitrate the safety question and the association ended the lockout (J.A. 7a; 382a-390a). After viewing the operation, the arbitrator ruled that the unloading with pallets was "an unsafe operation" (J.A. 7a; 391a-395a). A & G then substituted slings and completed unloading without incident (J.A. 7a; 75a).

The Board's Conclusions.—The Board agreed with the Trial Examiner (Pet. 20, 31-32) that the longshoremen's refusal to work with pallets was "a quitting of labor by * * * employees in good faith because of abnormally dangerous conditions for work" under Section 502 of the Labor Management Relations Act, so that the stoppage was not a strike. Consequently, it concluded that there was no breach of the no-strike commitment implicit in the grievance and arbitration procedure of the contract. The Board held that the association was therefore unjustified in locking out the members of Local 1291, and its action was a violation of Sections 8(a)(3) and (1) of the Act. The Board ordered the company to make the employees

whole for any loss in pay resulting from the illegal lockout (Pet. 22).

The complaint also alleged (J.A. 359a) that the lockout had "the effect of" depriving carloaders, ship cleaners, carpenters, maintenance men, clerks and checkers, who were represented by ILA Locals 1332, 1566, and 1242, of work, and that in this respect it further violated Section 8(a)(3) of the Act. The Board concluded (Pet. 20) that, "in the circumstances of this case, [the association] did not discriminate against the other categories of employees represented by Locals 1332, 1566 and 1242," and dismissed this portion of the complaint.

The Court of Appeals' Decision.—The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. 10-17).

ARGUMENT

Petitioner's contention is that the Board and the court of appeals erred in declining to find that the clerks and checkers, who were deprived of employment as a result of the unlawful lockout of the longshoremen, were also discriminated against in violation of Sections 8(a)(3) and (1) of the Act. This issue turns on the circumstances of this particular case and does not warrant review by this Court. In any event, the Board's decision was correct.

The Board found that the lockout of the longshoremen violated the Act on very narrow grounds. Since the contract contained a grievance and arbitration procedure which implied a commitment not to strike, the work stoppage would have been unprotected by Section 7 of the Act had it been an ordinary strike.

The association could then, in the interest of protecting its contract procedures, have locked out the remainder of the longshoremen in the unit. See *New York Mailers' Union Number Six* v. *National Labor Relations Board*, 327 F. 2d 292 (C.A. 2). Indeed, on many occasions since 1952, the association had ended walkouts and compelled submission of grievances to the contract procedures by threatening a lockout (J.A. 36a; 267a-306a, 645a-697a). The present lockout exceeded permissible bounds because the particular working conditions were abnormally dangerous, and thus, under Section 502 of the Labor Management Relations Act, the work stoppage was not a strike. In these special circumstances, the Board could well conclude that although the lockout was illegal, its effect on those employees who were only incidentally harmed did not justify the granting of relief to that class. The clerks and checkers were doubtless aware that the association's dispute was with Local 1291—*i.e.*, with the longshoremen—and they would not consider the lockout as retaliation or punishment against their own local. Nor would they, as in the typical case of an illegal lockout, view their incidental loss of employment as one of the perils of union activity on the part of co-employees—an attitude which might limit their own participation in protected concerted activity. On the factual situation before it, the Board

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If an employer does engage in a lockout that is clearly unlawful, the Board grants relief to employees who are incidentally harmed as well as to those at whom the lockout is directed. See *The Evening News Association*, 145 NLRB No. 101; *The Great Atlantic & Pacific Tea Co.*, 145 NLRB No. 30.

could properly limit relief for the consequences of the association's ill-advised defensive measure to those employees who were primarily and directly affected by the association's conduct.

There is no substance to petitioner's contention that the Board and the court of appeals ignored the trial examiner's finding that the work of the longshoremen and the other employees was interrelated, or that they ignored the holding in *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, that certain kinds of discrimination violate the Act without specific proof of illegal intent (Pet. 4-7). Both the Board and the court accepted the examiner's finding and recognized that some conduct is "inherently discriminatory." However, they reasonably concluded that in the circumstances of this case the lockout of the longshoremen did not have the necessary and foreseeable consequence of discouraging union activity by clerks and checkers. Hence it was not "inherently discriminatory" as to them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1964